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No. 75-732

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

KFC NATIONAL MANAGEMENT CORP.
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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NATIONAL LABOR RELATIONS BOARD,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, KFC National Management Corp., prays that a Writ of Certiorari issue to review the final Judgment of the United States Court of Appeals for the Second Circuit entered on August 1, 1975, and rehearing of which was denied on August 20, 1975.

OPINIONS BELOW

There were no opinions issued by the Court of Appeals below when it granted Respondent's motion for summary enforcement and denied Petitioner's subsequent petition for rehearing. Petitioner, as explained later herein, has no knowledge as to the basis for the Court of Appeal's

decisions. The Supplemental Decision and Order of the National Labor Relations Board issued on October 24, 1974 (hereinafter called the "Board") is reproduced in Appendix C to this petition and is officially reported at 214 NLRB No. 29, 87 LRRM 1685 (1974).

JURISDICTION

The Judgment of the Court of Appeals was entered on August 1, 1975. A petition for rehearing was denied on August 20, 1975. The jurisdiction of this Court is invoked under 28 USC 1254(1).

QUESTIONS PRESENTED

1. Should a Collective Bargaining Representative be imposed on an unsuspecting and non-consenting work force that has never signified its majority support for the labor organization involved?
2. Do the recent decisions of this Court require that the factor of normal employee turnover in an employer's work force be considered in the application of the rule in *Brooks* v. *Labor Board*? [1]
3. Should an Employer be obligated to bargain with a labor organization that does not know the identity of the employees in its work force and has never demonstrated majority status among them?

STATUTES INVOLVED

The relevant provisions of the Labor Management Relations Act, 1947, as amended 28 USC 151, *et seq.*

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[1] 348 U.S. 96, 35 LRRM 2158 (1954).

RELEVANT STATEMENT OF THE CASE[2]

In October, 1971, the Bartenders, Hotel, Motel, Cafeteria and Restaurant Employees Union lost an election in which 88% of the eligible persons voted, by a count of 41 to 37. The unit involved was ninety-two employees working in twelve (12) retail fast food stores of the Petitioner in Connecticut and Western Massachusetts. The results were subsequently set aside by the Regional Director of the National Labor Relations Board because of improper supervisory activity. A second election was held in June 1972 with only 57% of the eligible voters turning out, which the Union won 34 to 20. Forty-three (43%) percent of the eligible employees in the unit, however, did *not* vote.

Petitioner objected to the outcome, *inter alia*, because of pro-union activity by sympathetic store managers.[3] The Regional Director found evidence of such activity but refused to set aside the second election. The Employer then exercised its statutory right to obtain review of this decision which took a period of almost 2 years culminating on May 8, 1974, in Circuit Court denial of enforcement of the Board's Decision and Order requiring the Employer to bargain with the Union and remanding the case to the Board.

The remand was occasioned by the Court's unanimous finding that the Petitioner had been denied administrative due process of law by the Board in evading the

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[2] The facts stated here are limited to those directly germaine to the issues raised in this petition. For more comprehensive background, attention is directed to Appendix D of this Petition, which sets forth the four year history of the litigation in much greater detail.

[3] Some of them had been included in the unit as supervisors under Section 2(11) of the Act by the Regional Director in his pre-election decision, against their wishes.

statutory procedures for review of the Regional Directors' decision under Section 3(b) of the Act. *KFC National Management Corp.* v. *NLRB* (CA. 2) 497 F.2d 298, 86 LRRM 2271 (1974).

During the period of this Board occasioned delay, 92 of the original 96 employees eligible to vote in the second election voluntarily left the employ of the Company.[4] This virtual 100% turnover in the unit work force was due to normal economic factors and in no way was occasioned by unfair labor practices of the Employer.[5]

In the interim between the Court of Appeals' action denying enforcement and the issuance of the Board's Supplemental Decision on remand, the Employer filed a petition for a new election with the Regional Office. It submitted documentation seriously questioning whether the Union represented the employees.[6] Further evidence was supplied that the Union had not been in contact with the work force or been seen at any of the employer's stores for well over a year. The Regional Director administratively dismissed the petition for an election *solely* on the basis of the Board's Supplemental Decision, which had then issued a few weeks earlier, reaffirming the Board's original decision that the Union was properly certified. Petitioner filed a second petition for review of the Board's Supplemental Action with the Circuit Court.

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[4] Since that time additional employees have left or become supervisors so that only a single employee of the original 96 remains in the work force today.

[5] During the entire history of this litigation not a single independent unfair labor practice has been charged against the Petitioner.

[6] The challenge did not just go to the majority status of the Union, but to its representation of *any* of the 96 new employees in the unit, for at that time the local had written to the Employer asking for a list of the names, addresses, and store locations of the entire work force because of "a changeover of employees."

The Employer attempted to raise before the Court the issue of a new election based upon the unusual change in circumstances in the composition of the work force but the Court, after an unexplained delay of almost six (6) months, ruled on a motion that denied Petitioner the right to file a record appendix or briefs on such issue. It also denied oral argument and granted summary enforcement of the Board's Supplemental Decision and Order on June 4, 1975. No opinion was issued by the Court but merely a one sentence ruling on the motion. (See Appendix B). Not knowing whether the Court of Appeals had ruled on the basis of the unresolved issues over pro-union supervisory activity left from the first appeal, or the issue of a new election because of the almost complete change in the work force, the Employer filed a petition for rehearing in a vain attempt to get some indication of the basis for the Court's ruling. On August 21, 1975, in a one sentence order the petition for rehearing was denied. (See Appendix A). For the reasons set forth hereinafter the Employer has filed this Petition for Certiorari.

REASONS FOR GRANTING THE WRIT

1. A LABOR UNION IS BEING IMPRESSED AS COLLECTIVE BARGAINING AGENT UPON AN UNSUSPECTING AND NON-CONSENTING WORK FORCE AS AN UNANTICIPATED RESULT OF A RULE APPROVED BY THIS COURT.

In view of the virtual 100% departure of the work force the net effect of enforcement of the Board's order is to foist an alien labor organization upon a totally stranger work force. The Union's request for names and addresses constitutes independent evidence from which it may be inferred that the current employees are not aware of the union's existence and do not support it. In terms of numbers alone, a single remaining employee

who voted in the election some three and a half (3½) years ago, has become the instrument through which ninety-six (96) current employees will now be required to have a union as their bargaining representative.[7]

The entire basis for such action by the Board is grounded upon this Court's decision in *Brooks* v. *Labor Board, supra*, where the Court held that absent "unusual circumstances" no question of a union's majority status may be raised during the first year after certification by the Board.[8] The rationale for the rule was designed to prevent employees from voting in the union one day, and changing their mind the next, as in *Brooks* where the employees petitioned the employer six (6) days after the election that they had had a change of heart.

No where in the case was there any discussion of changing economic factors such as the ebb and flow of normal employee turnover in the unit work force. In its decision in *Brooks* the Court did not consider or anticipate the factor of the mobility of a work force in the decade of the seventies which through normal activity, over a lengthy period occasioned by government delay, results in total erosion of those who originally expressed a desire for union representation.

This Court has itself delineated the perameters of the *Brooks* rule:

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[7] In the second election the Union only received 35% of the vote among the total employees eligible to vote. Thus the Union did not demonstrate even *de facto* majority status among *all* the unit employees involved at the time.

[8] It is important to note that at the time the employer filed a petition for a new election in 1974 there was no lawfully existing certification under the first decision of the Court of Appeals denying enforcement of the Board's order. It suggests also that there may be a question as to whether the *Brooks* rule applies at all in this situation, and that an election should be held under this Court's decision in *Linden Lumber Div. Sumner & Co.* v. *NLRB*, 419 U.S. 301, 87 LRRM 3236 (1974).

> "In short, as we said in *Brooks* v. *Labor Board*, 348 US 96, 103, the Act placed a nonconsenting *minority* under the bargaining responsibility of an agency selected by a majority of the workers." (emphasis supplied) *Garment Workers* v. *Labor Board*, 366 US 731, 737, 48 LRRM 2251 (1961).

The Court labeled the vice in the *Garment Workers* case as the conferring of exclusive bargaining status on an agency selected by a minority of the employees. In the context of the present case, application of the *Brooks* rule is doing exactly the opposite of the result banned by this Court in *Garment Workers*, namely impressing a bargaining agent upon an unsuspecting and non-consenting majority. Such result clearly undercuts the principle of free choice of bargaining representatives by the employees which is guaranteed to them by Section 7 of the Act.

Further, where this case appears to stand apart from others that have involved the application of the *Brooks* rule, is that at no time has the Union ever demonstrated even on a *prima facie* basis that it had the support of a numerical majority of the total number of employees in the bargaining unit.[9]

Likewise, the present case has the important distinguishing feature that no independent unfair labor practices have been charged against the Employer at any time. Thus unlike *NLRB* v. *Warren Co.*, 350 US 107, 37 LRRM 2170 (1955) the Company can genuinely assert that it has not attempted to erode the basis of whatever union support may have originally existed. In *Warren* this Court, without reference to *Brooks*, grounded its reversal of the Court of Appeals' decision, relieving the Employer from bargaining with the Union,

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[9] The Board and the Courts require such a showing of an absolute numerical majority on the total number of employes in the unit where the Union is seeking a bargaining order based upon authorization cards in the fact of substantial unfair labor practices.

upon the presence of clear and flagrant unfair labor practices which appears to have neutralized the fact of substantial employee turnover. Fairly read, *Warren* raises a strong impression that the Court on the facts of this case, would have been decided the other way.[10]

Petitioner submits that this Court should review the Labor Board's application of the *Brooks* rule in light of the "unusual circumstances" existing here. As noted below this Court has in several recent cases given substantial recognition to the factor of employee unit composition. Further, the *Brooks* rule should be reexamined after 21 years for "fine tuning" in light of the current national economic patterns and especially the sociological factor of employee mobility not discussed by the Court in *Brooks*.

2. THE COMPOSITION OF THE WORK FORCE HAS BEEN CONSIDERED A CRITICAL FACTOR BY THIS COURT IN DECIDING WHETHER TO IMPOSE THE OBLIGATION TO BARGAIN UPON AN EMPLOYER.

If the facts of this case revealed a change of employers, the factor of the employer turnover alone, would be sufficient to nullify any obligation to bargain and eliminate a bar to an election even under the *Brooks* rule. *NLRB* v. *Burns International Security Services*, 406 US 272, 80 LRRM 2225 (1972) Fn. 3.

The Court however in *Burns* found that since the successor employer had hired 27 of the original 42 employees in the unit which had voted for the Union and been cer-

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[10] Several Courts of Appeal appear to be so inclined. *NLRB* v. *Hood, Inc.*, (CA. 1) 496 F.2d 515, 86 LRRM 2129 (1974); *Clark's Gamble Corp.* v. *NLRB*, (CA 6) 407 F.2d 199, 70 LRRM 2625 (1969).

tified, the Union had demonstrated *prima facie* majority status which continued even after the change of ownership.

In a later case the Court continued to recognize that the make up of the work force is an equally vital consideration in determining whether or not there has been a change in the "identity" of the enterprise. As observed by Mr. Justice Marshall for the 8-1 majority in *Howard Johnson Co.* v. *Detroit Joint Board*, 417 US 249, 86 LRRM 2449 (1974):

> "This continuity of identity in the business enterprise necessarily includes, we think a substantial continuity in the identity of the work force across the change of ownership." *Supra* at 417 US 263, 86 LRRM 2454.

The *Brooks* rule assumes both a continuation of the employer entity as well as the composition of the work force that voted in the election. Yet this Court has recognized that a collective bargaining agreement should not be imposed upon an employer that came as a stranger to its work force and bargaining representative. *NLRB* v. *Burns International Security Services, supra.*

Presented here is the issue whether the obligation to bargain should be imposed upon an employer, which through unusual circumstances, not of its own doing, acquires a totally new work force from the one which originally expressed some interest several years ago in union representation. Implicit in this inquiry is whether the cause of industrial peace is served by the imposition of a labor relations environment foreign to the realities of current conditions.[11]

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[11] The Employer here asserts its own rights as the basis for seeking review and not just those of the current employees under Section 7 of the Act. An employer is entitled to be required to bargain only where the representative does, in fact, speak for its

Indeed, no better proof that the Union considers itself an outsider can be found than in their request to the Employer, some five (5) days after the Board's Supplemental Decision in 1974, for information as to the names, addresses and store location of the employees they have been assigned to represent by the Labor Board. The Board, and for all we know, the Court of Appeals, have totally ignored this critical factor which puts the certified Union in the position of not knowing the identity of those whom they are supposed to represent. They are truly a stranger in a strange land.[12]

In light of this Court's expressed interest in the composition of the work force in *Burns* and *Howard Johnson's* it was incumbent upon the Board in applying the *Brooks* rule to have given substantial weight in their deliberations to the virtual 100% turnover in the composition of the work force rather than to dismiss it as "irrelevant". The Petitioner's filing for a new election was appropriate, and clearly the preferred means under both the majority and minority views in *Linden Lumber Div. Snmner & Co.* v. *NLRB*, *supra* for resolving a question of representation in the absence of unfair labor practices.

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employees. Otherwise, the prejudice is that the demands for a contract are those of the Union and not the employees. If grounded upon matters unrelated to its business operation, such demands can well be of serious injury to the employer, if the Union attempts to compel the employees to strike to obtain them.

[12] These facts clearly distinguish the present case from *Monroe Auto Equipment Co.* v. *NLRB* (CA. 5) 511 F.2d 611, 89 LRRM 2105 (1975) relied upon by the Board below. In *Monroe* 588 out of 647 eligible employees voted and the Union received 342 votes, a clear *de jure* majority. Further 58% of the original employees were still working for the Company at the time the case was decided by the Courts (See 84 LRRM 2835).

3. THE ABSENCE OF ANY OPINION BY THE COURT OF APPEALS HAS SUBSTANTIALLY IMPEDED PETITIONER'S STATUTORY RIGHT TO SEEK REVIEW IN THIS COURT.

The absence of any written opinions in the Court below leaves Petitioner in the dark as to the reasons why its second petition for review and subsequent petition for rehearing were denied. Which issues the Court even reached, is at this point, known only to the members of the panel. The Second Circuit has not performed its judicial duty in this case. *Cf.* Canon 19, Canons of Judicial Ethics. The right to be heard includes the right to know that one has been listened to. It is a vital keystone for acceptance of decisions under our judicial system.

The Court's action has placed an almost impossible burden on Petitioner in preparing this petition. Petitioner therefore raises what it considers to be the most vital issue at this stage of the long litigation. Thus, although it does not raise matters concerning the question of the Board's refusal to set aside the second election because of the supervisor's pro-union activity, and other ancillary issues involving inclusion of certain affidavits in the record, as well as the lack of an evidentiary hearing on its objections, Petitioner does not waive herein any of its rights with regard to these other matters.[13]

CONCLUSION

This case presents an important question involving the administration of the National Labor Relations Act. The

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[13] Petitioner makes this assertion, not to able to later raise additional questions if the Writ is granted, but merely to indicate that it continues to believe there was merit in its other positions argued below.

Brooks rule was enunciated two decades ago. It was never intended as a means to impose a bargaining agent upon a group of employees who had absolutely no part in bringing about its existence. The present case presents a question whether the parameters of the rule may exert too harsh an impact in light of changing economic realities. At bottom this case clearly falls within the "unusual circumstances" exception to the rule which has been improperly and mechanically applied by the Board and the Court below. For these reasons the writ of certiorari should be granted.

Respectfully submitted,

November 18, 1975.

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 20th day of August, one thousand nine hundred and seventy-five.

Present:

HON. IRVING R. KAUFMAN,
Chief Judge,
HON. J. JOSEPH SMITH,
HON. ROBERT P. ANDERSON,
Circuit Judges.

Docket No. 73-1982

KFC NATIONAL MANAGEMENT COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

A petition for a rehearing having been filed herein by counsel for the Petitioner,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

/s/ A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

by /s/ [Illegible]
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the fourth day of June, one thousand nine hundred and seventy-five.

KFC NATIONAL MANAGEMENT COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

It is hereby ordered that the motion made herein by counsel for the respondent dated December 18, 1974 to consolidate the action herein with the action in Docket #73-1982 and to submit the case without further briefs or oral argument, or in the alternative to summarily enforce the Board's supplemental order in Docket #74-2456 be and it hereby is granted.

It is further ordered that the Board's supplemental order in Docket #74-2456 is ordered enforced.

/s/ Irving R. Kaufman
Irving R. Kaufman
Chief Judge

/s/ J. Joseph Smith
J. Joseph Smith

/s/ Robert P. Anderson
Robert P. Anderson
Circuit Judges

APPENDIX C

MFJ
D—8911
214 NLRB No. 29 Springfield, Mass.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 1—CA—8656

KFC NATIONAL MANAGEMENT COMPANY

and

BARTENDERS, HOTEL, MOTEL, CAFETERIA AND RESTAURANT EMPLOYEES UNION, LOCAL 116, AFL-CIO

SUPPLEMENTAL DECISION AND ORDER

On June 29, 1973, the National Labor Relations Board issued a Decision and Order in the above-entitled proceeding,[1] finding that the Respondent had engaged in and was engaging in certain unfair labor practices in violation of Section 8(a)(1) and (5) and Section 2(6) and (7) of the National Labor Relations Act, as amended, and ordering Respondent to cease and desist therefrom and take certain affirmative actions to remedy such unfair labor practices.

Thereafter, the Respondent filed a petition with the United States Court of Appeals for the Second Circuit for review of the Board's Order. The Board filed a cross-petition for enforcement and, subsequently, at the request of the court filed supplemental material. On May 8, 1974, the court granted the Respondent's petition for review, denied the Board's cross-petition for enforce-

[1] 204 NLRB No. 69.

ment of the Order, and remanded the case for consideration of the Respondent's request for Board review of the Regional Director's representation decision.[2] The Board decided to accept the remand. In remanding, the court reviewed the Board's procedures for review of the decisions by Regional Directors, found the delegation to staff assistants in this case to be too broad, and concluded the Board Members themselves must make the final decisions on whether or not to grant review.[3] Thereafter, on July 1, 1974, the Respondent filed a supplemental response on remand from court of appeals.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[4]

In the underlying representation Case 1—RC—11692, the Regional Director issued a Third Supplemental Decision on Objections and Certification of Representative in which, *inter alia*, he denied a hearing on the Respondent's objections to the election because no substantial and material issues were raised, overruled the objections in their entirety, and certified the Union. Subsequently, the Respondent's timely petition for review of the Regional Director's decision was denied as it raised no material issues warranting review. Thereafter, the Respondent's motion for reconsideration of the re-

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[2] *KFC National Management Corp.* v. *N.L.R.B.*, 497 F.2d 298 (C.A. 2, 1974).

[3] In the latter part of 1973, the Board revised its procedures so as to assure the personal participation of the Board Members in all final decisions on whether or not to grant review.

[4] The Respondent requests that the full Board consider its request for review, as supplemented herein. It is customary Board policy for the same panel, which decided the case originally, to pass upon any subsequent matters therein and as none of the original panel Members has requested full Board consideration, the request is denied. See *Enterprise Industrial Piping Company*, 118 NLRB 1.

quest for review and for a hearing on its objections was denied as lacking in merit.

In its supplemental response the Respondent (1) reiterates the contentions in its request for review, especially with respect to supervisory support of the Union and incorporates by reference parts II and III of its brief to the court in the enforcement proceeding; (2) contends that the court's remand nullified all intervening proceedings subsequent to the filing of the request for review and therefore the Board must consider the request for review as if it were presently pending in the representation proceeding, and (3) alleges alternatively that a new election be conducted pursuant to its petition in Case 1—RM—909 filed on June 27, 1973, because almost 100 percent of the employees on the eligibility list at the time of the second election on June 16, 1972, are no longer working for the Respondent, and the present complement of employees should have the opportunity to express their desire on union representation.

In accordance with the court's remand, we have reexamined and reconsidered, *de novo*, the Respondent's request for review, as supplemented in the supplemental response, of the Regional Director's Third Supplemental Decision on Objections and Certification of Representative. The Regional Director issued his Third Supplemental Decision after investigating the Respondent's objections to the election and considering the testimony of the Respondent submitted in support of its objections and the pertinent Board precedents. In Objection 1, the Respondent alleged that a representative number of voters had not participated in the election and that eligible voters may have been subjected to improper influences. The Regional Director found that the vote was representative in that 57 percent of the eligible voters cast ballots in the election and therefore no hearing was warranted and that the Respondent offered no evidence

to indicate that any employee was unfairly prevented from exercising his right to vote or to support its improper influence contention. Accordingly, he overruled the Objection 1.

As to Objection 2, dealing with the alleged prounion advocacy by two supervisors, the Regional Director considered the testimony offered by the Respondent from several employees and two store managers who were supervisors. According to the Regional Director's Third Supplemental Decision, the evidence indicated that Supervisor Roberson advised employees that (1) he had requested the repair of a walk-in refrigerator and a 10-percent wage increase and (2) they were to receive a breadtable to help them. However, the refrigerator was never repaired and the wage increase and breadtable were not forthcoming. The Respondent claimed it was not notified of these statements and promises by Roberson and that they allegedly were intended to influence the employees to vote for the Union. The Respondent, however, offered no evidence to support the latter claims. There was also evidence of conversations between Supervisors Roberson and Owens, in which the former allegedly attempted to have the latter support the Union. There was no indication, however, that the conversations occurred in the presence of any eligible unit employees.

The Respondent also submitted to the Regional Director evidence by Supervisor Drumm to the effect that employees had approached him and related to him that Supervisor Barry had, in several different ways, urged them to vote for the Union. According to the Regional Director, although one employee testified he had never heard Barry make prounion statements or urge a vote for the Union and although another employee stated that Barry had suggested that a union would be of no use, there was evidence that Barry subsequently told these two employees that they should vote for the Union

because the Respondent was "always on his back" regarding the employees' work. Further, an employee stated that Barry had also told him, "it's up to you" if you want to vote for the Union.

The Regional Director also found that the Respondent had sent several letters to the homes of all eligible employees indicating its opposition to the Union. Further, the Respondent had each store manager, including Supervisors Barry and Roberson, post a statement of opposition to the Union under their own signatures. In addition, the Respondent conducted three meetings of supervisors cautioning them to be neutral and not to express their individual preference concerning the Union. In all these circumstances, the Regional Director found *inter alia*, that (a) the Respondent had made known to employees its sentiments concerning the Union through mailings and postings, thereby precluding any mistaken belief that the supervisors were acting on behalf of the Respondent; (b) the supervisors' behavior furnished no reasonable basis for the creation of a fear of future retaliation in any employee's mind; and (c) the participation of the two supervisors in the Union's election campaign was incidental at best. Accordingly, he overruled the objections in their entirety and denied the Respondent's request for a hearing on the supervisory participation issue because no substantial and material issues were raised and certified the Union as the collective-bargaining representative of the unit employees.

In its request for review, the Respondent again raised the issue of supervisory involvement in the Union's election campaign and the Regional Director's failure to consider the issue of the Union's interference with the conduct of his investigation and the failure to conduct a hearing on these matters. As indicated above, the Respondent has incorporated into its supplemental response portions of its brief to the court in the enforce-

ment proceedings concerning the prounion supervisory activity and we have also considered the brief in reaching our decision herein. Under Section 102.67(c) of the Board's Rules and Regulations, Series 8, as amended, the Board will grant review only where one of the following compelling reasons exists:

(1) A substantial question of law or policy is raised because of (a) the absence of, or (b) a departure from, officially reported Board precedent.

(2) The Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) The conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) There are compelling reasons for reconsideration of an important Board rule or policy.

After careful reexamination of the Respondent's request for review, as supplemented, we find that it does not reveal that the Respondent has presented any one of the compelling reasons for granting review. In its request for review, the Respondent contends that the Regional Director's decision to overrule its objections, particularly that pertaining to supervisory involvement in the Union's election campaign, and his denial of a hearing thereon was a departure from Board precedent and policy since substantial and material issues of both fact and law had been raised thereby which should have been resolved at a hearing. We do not agree with the Respondent's contention. As detailed above, the Regional Director considered the evidence presented by the Respondent and disclosed by his investigation concerning the prounion participation of Supervisors Roberson and Barry in the election campaign and concluded that, in all the circumstances including the notification to all employees

and their awareness of the Respondent's opposition to the Union, this participation was "incidental at best" and that the Respondent's objections raised no substantial and material issues warranting or requiring a hearing. Whether or not a hearing should have been conducted depends solely on the evaluation of the evidence before the Regional Director. Since it is our opinion that the Regional Director's conclusion based on this evaluation of the evidence was not clearly erroneous on the record before him and therefore not inconsistent with Board precedent and policy, this disagreement between the Respondent and the Regional Director as to the evaluation of evidence does not warrant granting the request for review.

In its request for review, the Respondent adverted to the fact that the Regional Director failed to consider the issue of the Union's alleged interference with his investigation of the objections by conduct allegedly calculated to interfere with Board processes and supporting the allegations of supervisory involvement. The evidence presented to the Regional Director showed that, at a postelection union meeting, a union official (1) praised Supervisor Roberson, but criticized other supervisors; (2) discussed the election and advised that there would be an investigation of the Respondent's objections; and (3) invited several employees to read the transcript of the hearing on objections to the first election so as allegdly to protect Roberson from discipline. The fact that the Regional Director's Third Supplemental Decision made no reference to this alleged interference with Board processes does not establish, in our view, that there was no consideration of such allegation but merely indicates that the Regional Director decided that there had been no interference with the extent and adequacy of his investigation, and that the evidence did not support the Respondent's objections. In any event, we do not believe that the alleged conduct if it occurred constituted

interference of such a nature as to interfere with the Board processes or that it supports the validity of the Respondent's supervisory involvement objection.

Accordingly, we deny again the Respondent's request for review as not raising substantial issues warranting review of the Regional Director's decision [5] in which he denied the Respondent's request for a hearing on its objections, overruled the objections in their entirety, and certified the Union.

As indicated above, the Respondent's supplemental response in the instant proceeding raises two additional contentions. In the first instance, the Respondent argues that the adjudication of the request for review must be made in the representation case. We find no merit in this argument. Under Section 9(c) of the Act, the record in the underlying representation proceeding has been made a part of the subsequent unfair labor practice herein and the Board and the courts have treated the two proceedings as one. Thus, it is well settled, under Board and court law, that the adjudication of representation case issues can properly be made, as herein, in the subsequent 8(a)(5) unfair labor practice proceeding without substantial prejudice to the Respondent's rights.[6] In the second place, the Respondent alternatively contends that a new election be held under its representation petition in Case 1—RM—909 because of alleged employee turn-

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[5] The Respondent did not specifically request review of the Regional Director's overruling Objection 1 which related to a lack of a representative complement participating in the election. In any event, we have considered that objection and agree with the Regional Director and also find that no hearing was required or warranted thereon.

[6] *Graphic Arts Finishing Co., Inc.*, 182 NLRB 318 (1970); *N.L.R.B.* v. *Bata Stove Company, Inc.*, 377 F.2d 821 (C.A. 4, 1967); see also *N.L.R.B.* v. *Dallas City Packing Company*, 251 F.2d 663 (C.A. 5, 1958).

over. We find no merit therein.[7] In the recent *Holly Farms* decision, the respondent therein asserted, as a defense to a refusal to bargain, that less than one-third of the employees eligible to vote in the election were currently employed and the remaining employees did not wish the union to represent them. In finding that this assertion did not constitute a valid defense to a refusal to bargain, the Board found that this assertion did not constitute "special circumstances" under the Supreme Court decision in *Ray Brooks*[8] warranting an attack on the union's conclusively presumed majority status for the year after certification. Further, the Board stated that it would be anomalous to permit the respondent to "benefit from a lapse of time, emanating from litigation of its objections, for which the Respondent is itself responsible." Similarly, as the Respondent herein is responsible for the litigation of the representation case issues herein, not only should it not benefit from the lapse of time caused thereby, but the Union and employees should not be penalized for such delay for which they cannot be faulted.

Accordingly, we reaffirm our original finding that the Respondent violated Section 8(a)(5) and (1) of the Act by refusing to bargain with the certified Union as its exclusive representative of the employees in the appropriate unit.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations

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[7] *Holly Farms Poultry Industries, Inc.*, 189 NLRB 663 (1971); see also *N.L.R.B.* v. *L. B. Foster Company*, 418 F.2d 1, 5 (C.A. 9, 1969), cert. denied 397 U.S. 990; *N.L.R.B.* v. *Little Rock Downtowner, Inc.*, 414 F.2d 1084, 1091 (C.A. 8, 1969).

[8] *Ray Brooks* v. *N.L.R.B.*, 348 U.S. 96 (1954).

Board hereby affirms as its Order the Order heretofore entered in this proceeding on June 29, 1973.

Dated, Washington, D.C. Oct. 24, 1974

Edward B. Miller, Chairman

John H. Fanning, Member

Howard Jenkins, Jr., Member
NATIONAL LABOR RELATIONS BOARD

[SEAL]

APPENDIX D

DETAILED STATEMENT OF THE FACTUAL BACKGROUND OF THE LITIGATION PRIOR TO THE FILING OF THE PETITION [1]

Petitioner, KFC National Management Corp., manages and operates a vast number of fast food retail outlets including the twelve (12) in Connecticut and western Massachusetts that are involved in this case. There are approximately one hundred (100) employees in the bargaining unit certified by the Board's Regional Director.

The matter began in 1971 when the Bartenders, Hotel, Motel, Cafeteria and Restaurant Employees Union, Local 116, AFL-CIO, filed a petition for an election with the Boston Regional Office of the National Labor Relations Board. After a hearing on the unit, the Regional Director issued a Decision and Direction of Election holding, *inter alia*, contrary to the Union's contention, that the twelve (12 store managers were supervisors within the meaning of the Act. No Request for Review was filed with the Board by the Union concerning the status of these managers and an election was held.

The Union lost the election 41 to 37 and, thereafter, timely filed objections to the results. On the barest of allegations, the Regional Director ordered a hearing on the Union's objections which encompassed several days and afforded the parties an opportunity to utilize the customary procedures of a trial to bring out appropriate facts.

The Regional Director sustained the Union's objections and directed a second election. The basis for his

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[1] Although this statement of factual background is extensive it only sets forth that portion of the case that may be of assistance in understanding the context of the issues raised in the Petition for Certiorari.

decision was that two store managers, one of whom, Elizabeth Roberson, had been a strong initial supporter of the Union but was excluded from the unit as a supervisor by the Regional Director in his pre-election decision, contrary to the Company's instructions had engaged in coercive conduct warranting a new election.[2]

Thereafter a second election was held in 1972 which the Union won, 34 to 20 but with some forty-three percent (43%) of the total number of eligible employees not voting. Thus, only a *plurality* of one-third of the total unit affirmatively signified their desire for Union representation in the second election.[3]

Subsequently the Employer learned that throughout the period preceding the second election, two store managers, Roberson and Barry, had, contrary to explicit instructions, repeatedly advocated support for the Union among the employees in their two stores who constituted one fourth (1/4) of the actual total of unit and almost fifty percent (50%) of the employees who ultimately voted in the second election.

The Employer timely filed Objections with the Regional Office *inter alia* because of the pro-Union activities of these two supervisors.

In support of its objectives, the Employer furnished other store managers and several bargaining unit employees to the investigating Examiner who took extensive affidavits.[4]

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[2] This fact becomes more critical because the Company produced evidence that this same supervisor *sub rosa* continued to work on behalf of the Union and improperly influenced the outcome of the second election which the Regional Director refused to invalidate.

[3] This should be contrasted with the first election results where the Union got *more* votes but still lost on a majority basis with about eighty-eight percent (88%) of the eligible voters casting ballots.

[4] In view of the Circuit Court's denial of the Employer's motion under 28 USC 2112(b) to supplement the record by requiring the

The Regional Director overruled the Company's objections, denied its request for a hearing and certified the Union as the bargaining agent. In his decision, he set forth his findings of fact and conclusions based upon the *ex parte* investigation conducted by his Field Examiner.

Although he admitted there was pro-union supervisory activity, and discussed the impact of such activity that he found took place he concluded it was "incidental" at best and insufficient to overturn the election.

The Company timely filed a Request for Review of the Regional Director's decision with the Board in Washington, and the Employer specifically challenged a wide variety of the Regional Director's findings of fact and conclusions. It also asked for a hearing on any disputed factual issue of pro-union supervisory involvement. A single member of the Board then met with two staff assistants of other Board members and "purported" to act on the Companys' Request for Review under the authority of Section 3(b) of the Act issuing an "order" in the Board's name denying review.[5]

The Employer filed a motion for reconsideration, claiming *inter alia* that it had not been accorded "equality of consideration" with regard to its post-election objections as the Union had been given full opportunity to litigate its position but the Company was being compelled to accept an *ex parte* determination and that such constituted a disparite and inherently unequal form of

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Board to produce the employee affidavits they are not "in the record" and available for examination to support the Regional Director's decision.

[5] The manner of the Board's consideration of the Request for Review which was subsequently found to be in violation of Section 3(b) was not at that time known to Petitioner, but subsequently came to light as set forth at a later point in this background statement.

procedure. The Employer further pointed out that this disparity would be compounded by the Board's use of its summary judgment procedures in any subsequent unfair labor practice proceedings which would prevent a trial.

In a second telegraphic "order", the motion for reconsideration was denied as lacking in merit. Again it was signed "By direction of the Board".

Meanwhile, unfair labor practice charges were filed by the Union when the Company declined to recognize the validity of the certification.[6] A complaint issued and following its customary summary judgment procedures, the Board ordered the Company to bargain.

The Employer, however, in the unfair labor practice proceeding had raised as a new defense a claim that in denying its Request for Review, and Motion for Reconsideration, the Board had failed to comply with the statutory requirements of Section 3(b) of the National Labor Relations Act in that it believed that only one (1) Board member had participated in the decisions made in Washington during the earlier representation proceedings instead of the three required by the statute. As to this issue, the Board in its decision stated that the two orders involved were "authorized" by the same panel rendering the unfair labor practice decision and had been issued in the name of the Board.

The Employer filed a petition for review in the Second Circuit and the Board cross-petitioned for enforcement. After the Board filed the certified list of the record with the Court, a motion to supplement the record under

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[6] The Employer's position was for the sole purpose of testing the validity of the Regional Director's and Board decisions on its objections to the result of the second election. No independent unfair labor practice charges have been filed against the Employer during the entire course of this litigation.

Section 28 U.S.C. 2112(b) was made by the Employer. The motion sought disclosure of the affidavits taken by the Regional Director's field investigator from employees during the course of his *ex parte* determination and subsequently relied upon to negate the Employer's post-election evidence as well as documents indicating the nature and extent of the three Board members participation in the decision to deny review and the motion for reconsideration. The Court denied the motion insofar as it sought to obtain the affidavits, but did order the Board to file "a detailed statement showing the extent and date of participation" of the three Board members. The Executive Secretary then filed an affidavit which as noted above, sustained the factual allegations, asserted by the Employer in support of its defense that the Board *prima facie* violated Section 3(b) of the Act.

On May 8, 1974, the Court of Appeals in a unanimous 3-0 opinion, held that the Board had notoriously evaded the express statutory requirement that three (3) Board members act in the consideration of petitions for review from decisions of Regional Directors under Section 3(b) of the Act. Climaxing a two and one-half year struggle (1) to obtain the facts as to what actually happened at the Board, (2) to overcome the Agency's insistence that its conduct could not be "challenged", and finally, (3) that it had acted properly, the Court held that the Petitioner had been denied administrative due process of law and "remanded the case to the Board".

The Court in its opinion said that the Board had failed to properly complete the representation procedures under Section 9 of the Act and remanded the case "for consideration of Petitioner's request for Board review of the Regional Director's representation decision." The action of the Court thus sent the case back to the Board to that point in time some twenty (20) months earlier when on September 7, 1972, it purported to allegedly deny review under the provisions of Section 3(b) of the Act.

The Board accepted the remand of the Court and invited supplemental statements which the Company duly submitted.[7]

In the meantime, the Employer, aware of the fact that 92 of the 96 employees in the original bargaining unit that were eligible to vote in the election had voluntarily left the employ of the Company, filed a petition for an election with the Regional Office on the grounds that no "final" certification had issued since the Board had yet to rule on its request for review under the provisions of the 102.67(f) of the Board's Rules and Regulations. The Employer submitted appropriate documentary evidence to the Regional Office in support of its position that it had a substantial doubt as to whether or not the Union continued to represent the employees in the unit.[8] No action, however, was taken by the Regional Office on the petition.

On October 24, 1974, the Board issued a supplemental decision and order reaffirming its original finding that an unfair labor practice had been committed by the Employer and ordering it to bargain with the Union.

Shortly thereafter, and while the Employer's petition was still pending before the Regional Office, the Union wrote a letter to the Employer advising that it had received the Board's decision and made the following request:[9]

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[7] The Employer subsequently moved the Board remand the case to the Regional office for the holding of an immediate election under a new petition for an election which was then being filed by the Employer.

[8] The Employer, *inter alia*, furnished affidavits that no Union representative had been on the scene or in contact with employees at the stores since some time in the early part of 1973.

[9] The Employer promptly submitted this letter to the Regional Office as further evidence of the fact that there was a substantial doubt as to whether or not the Union continued to represent the

"Since no doubt there has been a changeover in employees, we request a current list of employees and their addresses and the stores they are employed in."

On November 8, 1974, the Petitioner filed a second Petition for Review with the Second Circuit of the supplemental decision of the Board and the Board filed for cross-enforcement.

The Board filed a motion to consolidate the appeal with the earlier case and that the matter be decided without further briefs or oral arguments, or in the alternative for summary enforcement. The Board's motion was noticed for oral argument on January 7, 1975. Petitioner's Counsel filed an opposition statement to the Board's motion and was told by the Clerk's Office that oral argument would be rescheduled to another date. Petitioner, in its response, asserted that there were substantial *new* issues which were raised for the first time under the second petition for review and urged the Court to deny the motions of the Board and permit the filing of the Record Appendix, receive briefs on the merits, and schedule oral argument. No further word was heard from the Court following Petitioner's filing of its response on January 9, 1975.[10]

On May 19, 1975, the Employer received a notice from the Clerk of the Court—"The above-entitled case has been added to the general calendar as No. 332". Counsel was then instructed to advise the Court as to who would argue and the amount of time required for

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employees in the stores involved in the bargaining unit. On November 20, 1974, the Regional Director dismissed the Petition for an Election expressly based upon the supplemental decision of the Board and its order dated October 24, 1974.

[10] Why the matter was never rescheduled is still somewhat puzzling since it undoubtedly would have been of aid to the panel in its consideration of the motions.

oral argument. This form was duly returned by the undersigned Counsel for the Petitioner to the Court.

On June 4, 1975, the panel without explanation or opinion granted the motion to have the case submitted without further briefs or oral argument and ordered that the Board's supplemental order be enforced.[11] Perplexed by the total absence of any basis for the Court's ruling and whether it was on the grounds originally urged but left undecided under the first Petition for Review, or the contentions as to the *new* issues asserted under the second Petition for Review, Petitioner filed a Petition for Rehearing. On August 20, 1975, without explanation, the Petition for Rehearing was also denied.

[11] The Court also denied some procedural motions in connection with the record which are no longer germane at this stage of the litigation.